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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GOOGLE INC., a Delaware corporation, Plaintiff, v. AFFINITY ENGINES, INC., a Delaware corporation, Defendant.	CASE NO.: C-05-00598 JW (HRL) **DECLARATION OF DAVID H. KRAMER IN SUPPORT OF PLAINTIFF GOOGLE INC.'S OPPOSITION TO DEFENDANT AFFINITY ENGINES, INC.'S MOTION TO DISMISS AND/OR STAY PROCEEDINGS** Date: May 9, 2005 Time: 9:00 a.m. Judge: Honorable James Ware Courtroom: 8, 4th Floor

Dockets.Justia.com

I, David H. Kramer, declare as follows:

1. I am an attorney at law duly licensed to practice in the State of California and before this Court. I am a member of Wilson Sonsini Goodrich & Rosati, counsel for Plaintiff Google Inc. ("Google"). I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. Attached hereto as Exhibit A is a true and correct copy of the August 5, 2002 Employment, Confidential Information and Inventions Assignment Agreement between Orkut Buyukkokten and Google.

3. Attached hereto as Exhibit B is a true and correct copy of a May 9, 2002 offer letter and employment packet sent by Sergey Brin of Google to Orkut Buyukkokten.

4. In March 2004, counsel for AEI wrote to Google claiming that AEI owned the inCircle code and that Buyukkokten had copied unspecified inCircle code into the code implementing the Orkut.com service. Attached hereto as Exhibit C is a true and correct copy of a letter (without attachments) from G. Hopkins Guy, III, counsel for AEI, to Orkut Buyukkokten and David Drummond, General Counsel of Google, dated March 8, 2004. Counsel for the parties met twice (in March and April 2004) to discuss AEI's concerns. At the very first meeting, I specifically informed both Brian Samuels, then CEO of AEI, and Hopkins Guy, AEI's counsel, that "there were serious ownership issues" surrounding AEI's claim to own Mr. Buyukkokten's work. I further stated at that meeting that this case was a *Sagent v. Acta* situation, referring to a case Mr. Guy had handled against our firm. In that case, Mr. Guy represented a defendant accused of trade secret misappropriation, and claimed that the defendant actually owned the intellectual property at issue. My point in expressly referencing the case was to make clear that Google, not AEI, owned the rights to the code at issue in this case. Ownership aside, Google repeatedly offered to permit a neutral expert to compare the two programs and show that no code copying had occurred. AEI rejected all such offers.

5. Attached hereto as Exhibit D is a true and correct copy of Affinity Engines, Inc.'s Responses and Objections to Google Inc.'s First Set of Requests for Admissions, Request No. 28, served on March 4, 2005.

6. As of the date of this motion, only one deposition has been taken (a deposition of AEI). Although Google originally noticed that deposition in July 2004, because of the AEI's witness's conduct, Google brought a motion to recommence the deposition in the presence of a discovery referee. The court granted Google's motion. Attached hereto as Exhibit E is a true and correct copy of the Order, dated December 25, 2004, granting Google's Motion to Compel Responsive Deposition Witness and to Appoint a Discovery Referee, in the matter *Affinity Engines, Inc. v. Google Inc. et al.*, Superior Court of Santa Clara County, Case No. 104CV020368. The resumed deposition took place on March 24, 2005.

7. Attached hereto as Exhibit F is a true and correct copy of the Answer to Complaint of Defendants Google Inc. and Orkut.com LLC, filed on June 28, 2004, in the matter *Affinity Engines, Inc. v. Google Inc. et al.*, Superior Court of Santa Clara County, Case No. 104CV020368.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 18, 2005 at Palo Alto, California.

/s/ David H. Kramer
David H. Kramer